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The Interplay Between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing an Amendment to the Federal Rules of Civil Procedure

Introduction

Considerable confusion exists over how American parties should serve foreign defendants in litigation brought before state and federal courts, particularly in the context of service by mail. The federal or state ("domestic") rules permitting service abroad by mail and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter the Hague Service Convention or Convention) frequently send mixed signals to American courts and practitioners.¹ On the one hand, Federal Rule of Civil Procedure 4(i) and state rules of civil procedure frequently permit direct service by mail to foreign parties without any limitation.² On the other hand, the Hague Service Convention prohibits either all service by mail or prohibits such service when a signatory nation expressly objects to this method.³

A conflict exists among federal courts about how to reconcile incongruous aspects of domestic service provisions and the Hague Service Convention. Citing the mandatory language of Article 1 of the Convention, some courts have concluded that the Convention is the exclusive mechanism for serving abroad. Other courts, however, have treated the Convention as a permissive supplement, merely intended to *facilitate* fair and effective service. Given the precipitous increase in litigation involving foreign parties in American courts fueled by the rise in international travel, commerce, and industry,⁴ it is important to resolve this conflict.

1. See *infra* text accompanying notes 12-81.

2. See *infra* text accompanying notes 12-37.

3. See *infra* text accompanying notes 38-71.

4. The need to address international litigation has been recognized for over three decades. When Congress considered creating a commission in 1958 to study present international judicial assistance (*i.e.*, how foreign countries facilitate the reso-

This Note attempts to resolve the confusion in federal courts by proposing an amendment to the Federal Rules of Civil Procedure to clarify the circumstances under which the Hague Service Convention supersedes domestic service provisions.

Part One of this Note traces the development of Federal Rule of Civil Procedure 4(i) ("FRCP 4(i)") and the Hague Service Convention, finding that a conflict exists between the language of domestic service provisions and the Convention, particularly in the context of service by mail.⁵

Part Two examines conflicting judicial attempts at reconciling the language of domestic service provisions and the Convention, and presents three observations. First, the cases foster confusion by articulating two very different approaches.⁶ Second, none of the judicial resolutions satisfy basic principles of American civil procedure law.⁷ Finally, and perhaps most important, neither of these approaches adequately satisfies the Convention's goal of facilitating international litigation in the spirit of international cooperation.⁸

Part Two further contends that the mandatory language of the Convention must not be read in a vacuum, but in conjunction with the objectives of the Convention. Although the language and drafting history of the Convention suggest that it is mandatory, the stated purpose of the Convention—to facilitate the completion of international litigation in the spirit of international judicial cooperation—suggests that the Convention would permit other methods of service where compliance with the Convention would not effect service and would thereby deprive plaintiff of the ability to sue.

Thus, Part Three concludes that the Convention language, read in conjunction with its purpose, should be interpreted to prescribe a "rule of first resort,"⁹ an approach adopted by the concurrence in *Société Nationale v. U.S. Dist. Ct., S.D. Iowa*,¹⁰ to deal with a related conflict between domestic discovery rules and the Hague Evidence Convention.

lution of international litigation) and to recommend procedural improvements, the Senate Judiciary Committee noted that "[t]he extensive increase in the international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, has pointedly demonstrated the need and desirability for a comprehensive study of the extent to which international judicial assistance can be obtained." S. REP. NO. 2392, 85th Cong., 2d Sess. 3 (1958), reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 5201, 5202-03. Similarly, in the hearings preceding ratification of the Hague Service Convention, the Senate Foreign Relations Committee observed that "the continually increasing volume of American travel abroad, especially in Europe, of international business transactions, of U.S. investment abroad, the subject of insuring that U.S. citizens who were sued in foreign courts received notice . . . is a matter of substantial importance to this country." S. EXEC. REP. NO. 6, 90th Congress, 1st Sess. 6 (1967).

5. See *infra* text accompanying notes 12-81.

6. See *infra* text accompanying notes 124-31.

7. See *infra* text accompanying notes 132-42.

8. See *infra* text accompanying notes 143-58.

9. See *infra* text accompanying notes 159-204.

10. 107 S.Ct. 2542 (1987).

Under this rule of first resort, the plaintiff first must attempt to serve under the Hague Service Convention before employing more permissive domestic service provisions. This approach best resolves the interplay between domestic rules and the Hague Service Convention while at the same time maintaining United States respect for its treaty obligations.

Part Four of this Note proposes an amendment to the Federal Rules of Civil Procedure to clarify the meaning of the Convention. The proposed amendment requires resort to the Convention unless effecting service under the Convention is objectively impossible.¹¹

I. Service of Process Provisions

A. FRCP 4(i)

1. *History, Development and Purpose of FRCP 4(i)*

FRCP 4 prescribes the adequacy and manner of service of process in United States federal courts by stipulating when a party has authority to serve¹² and what methods that party may employ to effect service.¹³ FRCP 4(i), promulgated by the Supreme Court in 1963,¹⁴ provides alternative methods for serving foreign parties.¹⁵ Its alternative methods of service provide flexibility in an era of escalating international litigation and ensure that foreign courts will enforce American judgments against foreign parties.

FRCP 4(i) was part of a comprehensive plan to adapt federal law to the increasing need for international judicial cooperation: "The extensive increase in international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, has pointedly demonstrated the need and desirability for a comprehensive study of the extent to which international judicial assistance can be obtained."¹⁶ Escalating United States involvement in overseas investments, international travel, and trade or aid programs abroad prompted Congress to establish the Commission on International Rules of Judicial Procedure in 1958.¹⁷ After finding

11. See *infra* text accompanying notes 205-11.

12. Generally, parties may serve a summons or complaint "anywhere within the territorial limits of the state in which the district court is held." FED. R. CIV. P. 4(f). A party may, however, serve beyond the territorial boundaries of a state if the Federal Rules, a state statute or a federal statute provides authorization. *Id.*

13. Generally, any person who is over 18 years of age and not a party to the litigation may serve a summons or complaint. FED. R. CIV. P. 4(c)(2)(C)(ii). A party may also serve the defendant by mail or through other methods prescribed by the law of the state where the district court is located. FED. R. CIV. P. 4(c)(2)(C)(i) and 4(e).

14. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 650 (1965).

15. It is important to note that Rule 4(i) provides *alternative* methods of service. A party still may effect service upon a foreign defendant in the manner provided by a state statute. FED. R. CIV. P. 4(e).

16. S. REP. NO. 2392, *supra* note 4, at 3, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS at 5202-03.

17. *Id.* at 3, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS at 5202.

"existing means for serving judicial documents abroad . . . to be cumbersome or insufficient,"¹⁸ Congress empowered the Commission to study judicial assistance between the United States and other nations and to recommend improvements that would aid the settlement of international disputes in these new commercial contexts.¹⁹ The Commission ultimately recommended what is now FRCP 4(i).²⁰

FRCP 4(i) is a supplement that provides five alternative methods for serving foreign parties abroad. A party may serve a foreign defendant (1) in a manner provided by the foreign nation for service involving litigation within its own courts of general jurisdiction;²¹ (2) as directed by a foreign authority's response to a letter rogatory, so long as the method is reasonably calculated to give actual notice;²² (3) by personal service to the party, an officer of a corporate party, or the party's agent;²³ (4) by forms of mail requiring a signed receipt;²⁴ or (5) in a manner prescribed by an order of the district court.²⁵

FRCP 4(i) "introduces considerable further flexibility by permitting the foreign service and the return thereof to be carried out in any of a number of alternative ways that are also declared to be sufficient."²⁶ Moreover, the five alternative methods of service "allow accommodation to the policies and procedures of the foreign country."²⁷

2. FRCP 4(i)'s Operation

a. Authority to Serve

FRCP 4(i) does not independently authorize service abroad. To invoke FRCP 4(i), federal or state law must authorize extraterritorial service; a party may only use the five alternative methods of service "when the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in

18. *Id.* at 2, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS at 5202.

19. *Id.* at 1-2, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS at 5201.

20. The commission recommended the substance of FRCP 4(i) in its fourth report. The Judicial Conference and the Supreme Court both approved Rule 4(i) in 1963. Amram, *supra* note 14, at 650.

21. FED. R. CIV. P. 4(i)(1)(A).

22. FED. R. CIV. P. 4(i)(1)(B).

23. FED. R. CIV. P. 4(i)(1)(C).

24. FED. R. CIV. P. 4(i)(1)(D).

25. FED. R. CIV. P. 4(i)(1)(E).

26. FED. R. CIV. P. 4(i) Advisory Committee's Notes to the 1963 Amendments.

27. *Id.* According to Benjamin Kaplan, Federal Rules reporter at the time of the 1963 amendments,

The situations in which service in federal actions must be made abroad are diverse and so are the laws and conditions of the foreign countries. It therefore seemed wise to set up a number of alternative permissible manners of service that would provide a fair amount of choice and flexibility while assuring that the foreign defendant would get good notice.

Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 633, 635 (1964). Yet, "if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i)." *Supra* note 26.

which the district court is held.”²⁸ Under FRCP 4(e), a party may serve an individual who is not an inhabitant of the forum state in which the district court sits whenever a state or federal statute permits such extra-territorial service.²⁹ Therefore, before considering the alternatives set forth in subdivision (i), a party must determine whether any statutes permit service abroad.

b. Manner of Service

Once a party determines that it has the authority to serve abroad, it must then decide the method or manner of service. As a supplement,³⁰ FRCP 4(i) is not the exclusive method of service abroad. For instance, FRCP 4(e) permits service in the manner prescribed either by statute or by the Federal Rules. Alternatively, a party may choose the flexibility provided under FRCP 4(i) to serve abroad.³¹ Among the alternatives from which to choose under FRCP 4(i), a party may serve a foreign defendant by mail.³²

A party serving by mail must satisfy three requirements. First, the complaint or summons must be addressed and dispatched to the foreign party.³³ Second, it must be dispatched by the federal court clerk.³⁴ Third, the party serving the complaint must have proof of service including a signed receipt by the addressee or other evidence satisfactory to the court.³⁵ Mail service is a popular method because it provides an inexpensive and expeditious form of service requiring minimal activity in a foreign nation.³⁶

B. State Service Provisions

State service provisions are important for two reasons. First, the state service rule is independently significant where an American plaintiff sues a foreign defendant in state court. Second, FRCP 4(e) permits a plaintiff in federal court to serve a foreign defendant in a manner prescribed by state law. The state provisions applicable in both contexts generally permit service abroad by mail without any observable limitations.³⁷

28. FED. R. CIV. P. 4(i)(1).

29. FED. R. CIV. P. 4(e).

30. *See supra* note 15.

31. *See supra* notes 21-25 and accompanying text.

32. This Note principally focuses upon the mail service alternative. For a brief description of the other four methods of service provided under Rule 4(i), see 1 B. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL)* § 3-14 (1984). This Note confines itself to mail service because it adequately demonstrates the conflict between domestic law and the Hague Service Convention, and because it is a popular method of service.

33. FED. R. CIV. P. 4(i)(1)(D).

34. *Id.*

35. FED. R. CIV. P. 4(i)(2).

36. *See, e.g.*, B. RISTAU, *supra* note 32, at § 3-14.

37. *See, e.g.*, ARIZ. R. CIV. P. 4(e)(2)(a) (West 1988); ARK. STAT. ANN. § 16-58-119(a) (1987); D.C. CODE ANN. § 13-431 (1981); HAW. REV. STAT. § 634-24 (1985); MASS. GEN. L. ch. 223 A, § 6 (1986); N.Y. CIV. PRAC. L. & R. § 308(2) (McKinney

C. The Hague Convention on Service

1. History, Development and Purpose of the Convention

In October, 1964, delegates from the United States and twenty-two other nations to the Hague Conference on Private International Law considered and developed a convention on the service of judicial and extrajudicial documents.³⁸ On November 15, 1965, these twenty-three nations finished the final draft of the Hague Service Convention.³⁹ The United States was the first nation to ratify the Convention when on April 14, 1967, the Senate unanimously approved the Hague Conference's final draft.⁴⁰ Since then, twenty-four other nations have adopted the Convention.⁴¹

The Hague Service Convention advances three important objectives. First, the Hague Conference intended to create a simple and expeditious procedure for service of process in an effort to encourage international judicial cooperation.⁴² Second, the Convention attempts to prescribe means of service that would withstand attack in later suits to enforce a foreign judgment.⁴³ Third, the Conference adopted provisions directed at avoiding default judgments.⁴⁴ By satisfying these

1986); N.Y. VEH. & TRAF. LAW § 253(2) (McKinney 1986); OKLA. STAT. ANN., tit. 12, § 1702.01 (West 1980); 42 PA. CONS. STAT. ANN., R. 403, 404(3) (Purdon 1987).

38. On December 30, 1963, President Johnson signed a resolution authorizing United States participation in the Hague Conference on Private International Law. Pub. L. No. 88-244, 77 Stat. 775 (1963). See Amram, *supra* note 14; Note, *The Effect of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents*, 2 CORNELL INT'L L.J. 125 (1969). By participating in the Conference, the United States hoped to constrain European forms of service notorious for failing to give adequate notice to American parties. Note, *supra*, at 129-30. Four days before commencement of the Hague Conference, President Johnson signed into law a series of proposals recommended by the Commission on International Judicial Rules of Procedure to augment international judicial cooperation. Pub. L. No. 88-619, 78 Stat. 995 (1964). See Amram, *supra* note 14, at 650, 652. The United States delegation to the Hague Conference discussed the proposal with delegates from other nations. *Id.* at 652. The United States reforms for modernizing and encouraging international judicial assistance influenced the Hague Conference delegates when they drafted the Hague Service Convention. *Id.*

39. Note, *The Hague Service Convention and Agency Concepts: Lamb v. Volkswagenwerk Aktiengesellschaft*, 20 CORNELL INT'L L.J. 391, 395 (1987).

40. See Comment, *U.S. Ratification of the Hague Convention on the Service of Documents Abroad*, 61 AM. J. INT'L L. 1019, 1019 (1967).

41. The following nations adopted the Convention after the United States: Antigua and Barboda, Barbados, Belgium, Botswana, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, The Federal Republic of Germany, Greece, Israel, Italy, Japan, Luxembourg, Malawi, The Netherlands, Norway, Portugal, Seychelles, Sweden, Turkey, and The United Kingdom. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION 21-23 (1983). See also 8 MARTINDALE-HUBBELL LAW DIRECTORY (Part VII) 2 (1987).

42. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter Service Convention].

43. Note, *supra* note 39, at 396.

44. *Id.*

objectives, the Convention ensures adequate and timely notice.⁴⁵

The United States Senate in supporting such an international agreement also had envisioned several other objectives in ratifying the Convention. First, the Senate wanted to protect American citizens in foreign courts: "Given the continually increasing volume of American travel abroad, especially in Europe, of international business transactions, of United States investments abroad, the subject of insuring that United States citizens who were sued in foreign courts received notice . . . is a matter of substantial importance to this country."⁴⁶ Second, the Senate wanted to provide a uniform system of procedure to encourage foreign judicial assistance and cooperation:

With 49 separate procedural jurisdictions in the United States . . . a unitary approach is the only solution. We can hardly expect (a foreign government) to look favorably on a program of separate negotiation with the representatives of each of the 48 states and with the representatives of the Federal government. The problems must be solved through a single unified set of discussions, the results of which will be effective for all the 49 jurisdictions.⁴⁷

Third, "the convention carries out the spirit and purpose of Act No. 88-619 and the intent of Congress in the area of international judicial assistance."⁴⁸ The Senate's goals are consistent with the objectives stated by the Hague Service Convention.

2. *Operation of the Convention*

The Convention is divided into three sections that treat judicial documents,⁴⁹ extrajudicial documents,⁵⁰ and general matters⁵¹ "in all . . . civil or commercial matters. . . ."⁵² Under the section dealing with judicial documents, Article 2 requires each signatory to designate a Central

45. For other commentary on the purposes of the Hague Service Convention, see HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 41, at 28; S. EXEC. REP. NO. 6, *supra* note 4, at 1, 6.

46. S. EXEC. REP. NO. 6, *supra* note 4, at 6.

47. S. REP. NO. 2392, *supra* note 4, at 7, *reprinted in* 1958 U.S. CODE CONG. & ADMIN. NEWS at 5206 (statement of Lloyd Wright, former President, American Bar Association).

48. S. REP. NO. 6, *supra* note 4, at 6 (statement by Richard D. Kearney, Deputy Legal Adviser, Department of State). Public Law 88-619, which revised 28 U.S.C. §§ 1696, 1781 and 1782, provided liberal mechanisms for service of documents internationally as well as for the taking of evidence through depositions or production of documents. For a discussion of the reforms embodied in Public Law 88-619, see Amram, *supra* note 14, at 651.

49. Service Convention, *supra* note 42, at chpt. I, 20 U.S.T. at 362-65.

50. *Id.* at chpt. II, 20 U.S.T. at 365.

51. *Id.* at chpt. III, 20 U.S.T. at 365-67.

52. *Id.* at art. 1, 20 U.S.T. at 362. In speaking of the applicability of the Convention, Article One generally speaks in broad terms. "Civil or Commercial Matters" has different meanings for different signatory nations. This language does not include criminal proceedings in the United States and in the United Kingdom, fiscal and criminal matters in France, administrative issues in Japan, public law enforcement in West Germany, and family law in Egypt. See 1 B. RISTAU, *supra* note 32, at § 4-4. It is important to note, however, that the scope of the Convention is limited

Authority to handle service requests from other signatory nations.⁵³ Article 5 indicates that the Central Authority may authorize service by the internal law of the nation⁵⁴ or in a manner requested by the party attempting to serve if not inconsistent with the internal law.⁵⁵ Article 10, however, provides alternative methods of service that do not require the assistance of the Central Authority.⁵⁶ A party is free "to send judicial documents, by postal channels, directly to persons abroad"⁵⁷ or to "effect service" directly through judicial officials in the state of destination via judicial officers from the state of origin.⁵⁸ These alternatives apply so long as a signatory nation does not object in accordance with Article 21 of Chapter III.⁵⁹

Article 10(a) is the only provision that can be construed to authorize service by mail. Yet, this alternative service provision is a source of controversy. Some argue that Article 10 does not authorize service of a complaint or summons by mail.⁶⁰ Articles 10(b) and (c) refer to the freedom "to effect service." In dealing with postal channels, Article 10(a), however, only discusses the freedom "to send" judicial documents and does not specifically authorize *service* by mail. Given the specific references to means of service in other provisions and the absence of such language in Article 10(a) or in any other part of the Convention, the Convention may not provide for service by mail.⁶¹

because it provides methods of service but cannot authorize service independently. *De James v. Magnificence Carriers*, 654 F.2d 280 (3d Cir. 1981).

53. Service Convention, *supra* note 42, at art. 2, 20 U.S.T. at 362-63.

54. *Id.* at art. 5(a), 20 U.S.T. at 362.

55. *Id.* at art. 5(b), 20 U.S.T. at 362.

56. *Id.* at art. 10, 20 U.S.T. at 363.

57. *Id.* at art. 10(a), 20 U.S.T. at 363.

58. *Id.* at art. 10(b)-(c), 20 U.S.T. at 363.

59. The alternatives enumerated under Article 10 are available "[p]rovided the state of destination does not object. . ." *Id.* at art. 10, 20 U.S.T. at 363. The Convention requires that "[e]ach contracting state . . . inform the Ministry . . . of . . . opposition to the use of methods of transmission pursuant to articles 8 and 10. . ." *Id.* at art. 21, 20 U.S.T. 365. Czechoslovakia, Egypt, Japan, Norway, Turkey, and West Germany currently object to service by mail. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 41, at 97, 101, 106, 118, 126. Though Botswana has not declared any general objection, service by mail is insufficient where matters are before the High Court. *Id.* at 95.

60. See *Cooper v. Makita*, No. 87-0053-P, slip op. at 2 (D. Me. Sept. 24, 1987) (unpublished) (the Hague Service Convention does not provide for service by mail); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985) ("Sending a copy of a summons and complaint by registered mail directly to a defendant in a foreign country is not a method of service of process allowed by the Hague Convention").

61. In *Mommsen*, the court adopted this line of reasoning:

The Hague Convention repeatedly refers to "service" of documents, and if the drafters of the Convention had meant for subparagraph (a) of Article 10 to provide an additional manner of service of judicial documents, they would have used the word "service". To hold that subparagraph (a) permits direct mail service of process, would go beyond the plain meaning of the word "send" and would create a method of service of process at odds with the other methods of service permitted by the Convention.

108 F.R.D. at 446.

Others, however, indicate that the Convention was meant to permit service by mail.⁶² In discussing Article 10(a), the negotiation history explicitly mentioned service when it discussed the use of postal channels.⁶³ Article 10(a)'s language is apparently the product of a drafting error and the Convention permits service by mail so long as a signatory nation does not object under Article 21.⁶⁴

Compared to the alternative service provisions under the judicial documents section, the extrajudicial documents⁶⁵ and general clauses⁶⁶ sections are non-controversial. The extrajudicial documents section deals with items that are not directly connected with litigation, including the transmission of demands for payment⁶⁷ and notices to quit in connection with leaseholds.⁶⁸

The general clauses section, however, does contain two important provisions. Article 21 permits a signatory nation to object generally to the alternative methods of transmission provided under Articles 8 and 10.⁶⁹ Article 19 suggests that a party may serve a foreign defendant in a foreign signatory nation under that nation's internal law even though the Convention does not provide for that particular method of transmission.⁷⁰ The American delegation to the Hague Conference requested Article 19 to ensure that the Convention would not upset existing phi-

62. See *Precision Machine Works v. King*, No. 85-C-6782, slip op. at 1 (N.D. Ill. June 9, 1986) (unpublished) ("Japan . . . did not object to 10(a), which allows direct service to persons abroad through postal channels. . . . Accordingly, service by mail is not barred by the Hague Convention"); *Lemme v. Wine of Japan Import*, 631 F.Supp. 456 (E.D.N.Y. 1986) (service of process on Japanese distiller by mail under Article 10 of Hague Convention was sufficient); *Weight v. Kawasaki Heavy Ind.*, 597 F. Supp. 1080 (E.D. Va. 1984) (service by mail on Japanese manufacturer was effective under Hague Convention); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1206 (D.D.C. 1984) (article 10(a) of the Hague Convention permits service by mail so long as signatory nation does not object).

63. In explaining the background and purpose of Article 10(a), the negotiation history referred to the use of "postal channels" and indicated that the provision "permits service." 1 B. RISTAU, *supra* note 32, at § 4-28 (emphasis added).

64. According to one distinguished commentator on the Hague Service Convention,

It should be stressed that in permitting the utilization of postal channels . . . the draft convention did not intend to pass on the validity of this mode of transmission under the law of the forum state: in order for the postal channel to be utilized, it is necessary that it be authorized by the law of the forum state.

Id.

For information on the drafting error, see *id.*; *supra* note 32, at § 4-28 ("The use of different terms in the several paragraphs of Article 10 must be attributed to careless drafting").

65. Service Convention, *supra* note 42, at chpt. II, 20 U.S.T. at 365.

66. *Id.* at chpt. III, 20 U.S.T. at 365-67.

67. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *supra* note 41, at 43.

68. *Id.* at 43.

69. Service Convention, *supra* note 42, at art. 21, 20 U.S.T. at 365 ("Each contracting state shall inform the ministry, where appropriate, of . . . opposition to the use of methods of transmission pursuant to articles 8 and 10. . .").

70. *Id.* at art. 19, 20 U.S.T. at 365 ("[t]o the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in

losophy, procedure or policy regarding service of foreign documents within the United States.⁷¹

D. The Conflict Between Domestic Service Provisions and the Hague Convention

The parallel service provisions of domestic law and the Hague Service Convention often foster confusion. The language of domestic service rules is a trap for the unwary, often permitting service by mail to foreign parties without limitation.⁷² For instance, FRCP 4(i) permits service by mail without imposing any restrictions or encouraging resort to the Hague Service Convention provisions. The accompanying advisory committee notes fail to mention the existence of the Hague Service Convention and its seemingly mandatory language. Yet, the Hague Service Convention either prohibits service by mail at all times or prohibits such service when the signatory nation has objected generally in accordance with Article 21.⁷³ Given the optional and far-reaching language of Rule 4(i), attorneys plausibly could assume that no conflicting legal obligations exist. This confusion manifests itself in a wide array of service disputes⁷⁴ and has led to efforts to amend FRCP 4(i).⁷⁵ Moreover, the Rules Enabling Act⁷⁶ gives the impression that the Federal Rules supersede all conflicting statutes and treaties.⁷⁷

This confusion has several damaging consequences. First, mistakenly using a service method offensive to a foreign nation may hamper foreign recognition and enforcement of the American judgment abroad.⁷⁸ Second, uncertainty in serving a foreign party places greater burdens on court time and increases litigation costs by fostering disputes about the sufficiency of service.⁷⁹ Third, some nations impose

the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions").

71. 113 CONG. REC. 9404 (April 13, 1967).

72. See *supra* notes 32-37 and accompanying text.

73. See *supra* notes 60-64 and accompanying text.

74. See *infra* note 79.

75. See *infra* notes 205-08 and accompanying text.

76. 28 U.S.C. § 2072 (1982).

77. See *infra* notes 132-39 and accompanying text.

78. See 4A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1133 (1987) ("a foreign country is more likely to honor or enforce a judgment rendered in the United States if original service is made in a fashion familiar to the country in which enforcement is sought and consonant with its notions of fairness"). See also Kaplan, *supra* note 27, at 635-36 ("If the manner of service is not repugnant to the laws of the foreign country, the chances that a judgment in the action will be respected there may be enhanced"); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1040 (1961) ("Since service in a foreign country requires the performance of acts in that country, the extent to which it can be made is ordinarily at the sufferance of the foreign sovereign, whose objections may affect some or all incidents of the service attempted").

79. Conflict between domestic service provisions and the Hague Service Convention has prompted numerous cases involving the sufficiency of service abroad. See, e.g., *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986); *Vorhees v. Fischer & Krecke*, 697 F.2d 574 (4th Cir. 1983); *International Controls Corp. v. Vesco*, 593 F.2d 166

criminal penalties for inappropriately serving by mail.⁸⁰ Fourth, this confusion poses statute of limitations problems.⁸¹ Given these substantial consequences, a coherent understanding of the interplay between domestic service by mail provisions and the Hague Service Convention is important.

II. Current Judicial Attempts to Reconcile the Hague Service Convention and Domestic Service Provisions

A. State Court Resolution

Reconciling the Hague Service Convention with conflicting domestic service provisions requires a survey of state and federal decisional law. To be effective, any proposal to reconcile the Hague Convention and

(2d Cir. 1979); *Cooper v. Makita*, No. 87-0053-P, slip op. (D. Me. Sept. 24, 1987) (unpublished); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984); *Harris v. Browning-Ferris Ind.*, 100 F.R.D. 775 (D. La. 1984); *Tamari v. Bache & Co.*, 431 F. Supp. 1226 (N.D. Ill. 1977); *Shoei Kako v. Superior Court*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973). These cases are discussed *infra*.

80. See 4A C. WRIGHT & A. MILLER, *supra* note 78, at § 1133 ("A person not qualified by the law of the foreign country to make service may find that he is subject to criminal sanctions. . ."). See also Kaplan, *supra* note 27, at 635 ("Some [foreign countries] specify methods of service which may conceivably go counter to the policies of particular foreign countries, for example, a policy which regards service . . . punishable unless comporting with some approved local procedure").

81. See, e.g., FED. R. Civ. P. 4 Supplementary Practice Commentary-C4-34 (U.S.C.A. Supp. 1987) ("Generally speaking, no mistake under Rule 4 carries a serious consequence unless the statute of limitations has expired . . . it is the interim passing of the statute of limitations that will prove the plaintiff's undoing in a new action. . ."). For example, suppose a federal court with diversity jurisdiction finds that the plaintiff served the defendant insufficiently and therefore dismisses the case. The plaintiff must now reinitiate the action and properly reserve the defendant in the time remaining, if any, under the state statute of limitations. This is particularly serious in a diversity action where the court has found that serving a foreign defendant by mail is insufficient and where the applicable state statute of limitations does not toll until service. Given that service by mail is out of the question, the plaintiff will have to effect service under the Hague Convention through a central authority. Service through a central authority, central authority approval, and other formalities will further delay service. Yet, the plaintiff is working without the benefit of a newly commenced statute of limitations period. See *Bisones v. Toyota Motor Corp.*, Civ. A. No. 85-2365-S, 1986 WL 21,345 (D. Kan. 1986) (unpublished) (products liability action dismissed under state statute of limitations where service was effected under the Hague Convention beyond the limitations period, even though plaintiff faithfully made five attempts to effect service). See also THE COMMITTEE ON FEDERAL COURTS OF THE NEW YORK STATE BAR ASSOCIATION, SERVICE OF PROCESS ABROAD: A NUTS AND BOLTS GUIDE, reprinted in 122 F.R.D. 63, 77 ("[S]ince the Hague Convention is not one of the methods of service prescribed in Rule 4(i), it is not excepted from the requirement of Rule 4(j) that the summons and complaint be served within 120 days after the complaint is filed. Failure to meet that deadline will result in dismissal of the complaint—and loss of the right to pursue the action if the statute of limitations has run . . ." (footnotes omitted)). But see *Bailey v. Boilmakers Local 667 of International Brotherhood of Boilmakers*, 480 F. Supp. 274, 278 (N.D. W.Va. 1979) ("If the first service of process is ineffective, a motion to dismiss should not be granted, but rather the Court should treat the motion in the alternative, as one to quash the service of process and the case should be retained on the docket pending effective service").

domestic service provisions must treat similarly situated parties equally, whether in state or federal court, and must maintain uniformity of procedure to foster simplicity and to avoid confusion.⁸²

Under the Supremacy Clause of the United States Constitution,⁸³ all federal laws and treaties made under United States authority are "the supreme Law of the Land."⁸⁴ Generally, state courts have held that the Hague Service Convention supersedes state service provisions by virtue of the Supremacy Clause.⁸⁵ This comports with the Senate's intention to provide a uniform system of procedure in all of the states with respect to foreign service.⁸⁶

Two courts have held, however, that the Supremacy Clause does not necessarily subordinate state service provisions to the Hague Service Convention. In *McNulty v. Rocomat*,⁸⁷ the plaintiff was not required to serve in accordance with the Convention because the defendant received adequate notice and did not claim unfair advantage or surprise. Similarly, a Wisconsin state court noted in dictum that, although service under the Convention ensures adequate and timely notice, a plaintiff may employ other methods of service as well.⁸⁸

B. Federal Court Resolution

Federal courts seem to have adopted two different approaches in attempting to reconcile FRCP 4(i) and the Hague Service Convention

82. See *infra* notes 140-42 and accompanying text.

83. U.S. CONST. art. VI, cl.2.

84. U.S. CONST. art. VI, cl.2.

85. See *Rivers v. Stihl, Inc.*, 434 So. 2d 766 (Ala. 1983) (service by mail on West German defendant found insufficient given that plaintiff must comply with terms of the Hague Convention in accordance with Constitution's Supremacy Clause); *Volkswagenwerk Aktiengesellschaft v. Volkswagen of America*, 443 So. 2d 880 (Ala. 1983) (the Hague Service Convention has the status of a treaty and is therefore the supreme law of the land); *Kadota v. Hosogai*, 125 Ariz. 131, 608 P.2d 68 (Ct. App. 1980) (to extent state civil procedure is inconsistent with the Hague Service Convention, the Convention controls); *Porsche v. Superior Court*, 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (1981) (court quashed mail service on West German defendant pursuant to Hague Service Convention given that federal Supremacy Clause binds court to Convention); *Schlunck v. Volkswagenwerk Aktiengesellschaft*, 495 N.E.2d 1114 (Ill. App. 1 Dist. 1986) (by virtue of Supremacy Clause, state court bound by Hague Convention even in face of contrary state law); *Cintron v. W & D Machinery Co.*, 182 N.J. Super. 126, 440 A.2d 76 (1981) (service by mail upon West German defendant ineffective given German objection to service by mail under the Hague Convention); *Aspinall's Club Ltd. v. Aryeh*, 86 A.D.2d 428, 450 N.Y.S.2d 199 (App. Div. 1982) (more stringent state service law not to supersede Hague Convention as federal law given Supremacy Clause); *Law v. Bayerische Motoren Werke*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (N.Y. App. Div. 1981) (service by mail and upon Secretary of State in suit against West German defendant objecting to mail service under the Hague Service Convention insufficient given supremacy of Convention); *Cippala v. Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985) (despite state provisions permitting other methods for effectuating service, Supremacy Clause requires plaintiff to comply with terms of Hague Service Convention).

86. See *supra* note 47 and accompanying text.

87. 132 Misc. 2d 1064 (N.Y. Sup. Ct. 1986).

88. In *Re Marriage of Vause v. Vause*, 140 Wis. 2d 157, (Ct. App. 1987).

with respect to service abroad by mail. Some courts treat the Convention as a permissive supplement, merely intended to facilitate fair and effective service.⁸⁹ This interpretation is suspect because of the mandatory language of the Convention. Other courts require exclusive use of the Hague Service Convention where the party served resides in a signatory nation.⁹⁰ As a general approach, the purposes of the Convention seem to render this interpretation incomplete.

1. *The Hague Service Convention Does Not Supersede FRCP 4(i)*

According to some courts, the Hague Service Convention is merely a permissive supplement that neither abrogates the provisions of FRCP 4(i) nor prohibits service by methods unavailable under the Convention. These courts often have reasoned that the United States did not intend to preempt FRCP 4(i) by ratifying the Convention. For example, in *International Controls Corporation v. Vesco*,⁹¹ respondents served petitioner, a resident of the Bahamas, in accordance with FRCP 4(i)(1)(E) "as directed by order of court." Petitioner sought dismissal on grounds that the Hague Service Convention did not authorize this manner of service. Though the court held the Convention inapplicable, as the Bahamas was not a signatory, the court nonetheless commented on the interplay between the Convention and FRCP 4. The court noted in dictum that "the Convention was not intended to abrogate the methods of service prescribed by Federal Rule of Civil Procedure 4."⁹²

Similarly, in a case involving a good faith but failed attempt to abide by the Hague Service Convention, another court noted that the Convention does not circumscribe the judicial discretion and flexibility contemplated by Rule 4(i):

The Hague Convention carefully articulates the procedure which a litigant must follow in order to perfect service abroad, but it does not prescribe the procedure for the forum court to follow should an element of the procedure fail. Rule 4 stresses actual notice rather than strict formalism. [citations omitted]. There is no indication from the language of the Hague Convention that it was intended to supercede [sic] this general

89. See *infra* notes 91-99 and accompanying text.

90. See *infra* notes 100-23 and accompanying text. The tension between these two positions has been noted by several commentators. See, e.g., COMMITTEE ON FEDERAL COURTS, *supra* note 81, at 71-72; 4 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, *MOORE'S FEDERAL PRACTICE* ¶ 4.45 (2d ed. 1987) ("While there have been district court cases holding that service of process in a foreign country pursuant to Rule 4(i) was deficient for failure to comply with the Hague Service Convention provisions, it is by no means settled that Rule 4(i) has been superseded").

91. 593 F.2d 166 (2d Cir. 1979).

92. *Id.* at 179-80. See also *Saez Rivera v. Nissan Mfg. Co.*, 788 F.2d 819, 821 (1st Cir. 1986) (service upon Japanese defendant) ("Service could have been had upon Nissan, in Japan pursuant to FED. R. Civ. P. 4(i) or, where appropriate, the Hague [Service] Convention . . .") (emphasis added); *Barefield v. Sund Emba*, Civ. A. No. 85-4490, 1985 WL 4280 (E.D. Pa. 1985) (unpublished) (service upon Swedish corporation) ("Where service of process on a foreign corporation cannot be accomplished under Rule 4(d) or Rule 4(e), service may be made under Rule 4(i) . . . or under the Hague Convention") (emphasis added).

and flexible scheme, particularly where no injustice or prejudice is likely to result to the party located abroad, or to the interests of the affected signatory country.⁹³

Concluding that "[t]he Hague Convention should not be construed so as to foreclose judicial discretion when such discretion needs to be exercised,"⁹⁴ the court construed the Convention as complementary to the provisions of FRCP 4(i).⁹⁵

Other courts have reasoned that a permissive, supplemental approach corresponds to the purposes of the Convention. In *Newport Components v. NEC Home Electronics*,⁹⁶ California electronic equipment distributors brought state and federal antitrust claims against a Japanese corporation in federal court. Plaintiffs served the Japanese corporation via first class mail. The defendant in turn sought to dismiss the case for defective service based on Japan's objection to mail service under the Convention. The court refused to dismiss for insufficiency of service despite plaintiffs' failure to comply with the Convention. The court stated that the purposes of the Convention are not at odds with permitting service by methods unavailable under the Convention:

If it be assumed that the purpose of the convention is to establish one method to avoid the difficulties and controversy attendant to the use of other methods . . . , it does not necessarily follow that other methods may not be used if effective proof of delivery can be made.⁹⁷

The court asserted that the Convention should be considered in every case but need not be the primary source of authority.

The most extreme subordination of the Hague Service Convention to the provisions of FRCP 4(i) occurred in *Isothermics v. U.S. Energy Research and Development Agency*,⁹⁸ where a federal district court validated service by mail despite a specific objection filed by a signatory nation under the Convention. Plaintiff ("ISO") filed a complaint against Japanese defendants, alleging patent infringement. Plaintiff served by mail

93. *Fox v. Regie Nationale Des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984).

94. *Id.*

95. *Id.*

96. 671 F. Supp. 1525 (C.D. Cal. 1987).

97. *Id.* at 1542 (quoting *Shoei Kako v. Superior Court*, 33 Cal. App. 3d 808, 821 109 Cal. Rptr. 402, 411 (1973)). See also *Tamari v. Bache & Co.*, 431 F.Supp. 1226 (N.D. Ill. 1977), *aff'd* 565 F.2d 1194 (7th Cir. 1977) (quoting from *Shoei Kako v. Superior Court*). Moreover, the *Tamari* court noted that "the treaty was not meant to abrogate the provisions of Rule 4, as evidenced by the fact that there has been no change in the provisions of the Rule since the treaty became effective." *Id.* at 1229. But see Note, *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters Under the Hague Convention*, 3 REV. LIT. 493 (1983) (arguing that the *Tamari* court misused *Shoei Kako*, as evidenced by the fact that the two courts reached the opposite result). See also *Shoei Kako v. Superior Court*, 33 Cal. App. 3d 808, 822, 109 Cal. Rptr. 402, 412 (1973) ("It is more reasonable to infer that in approving subdivision (a) of Article 10 the Senate intended to retain service by mail . . . as an effective method of service of process in a foreign country unless that country objected to those provisions").

98. 434 F. Supp. 1155 (D.N.J. 1977).

in accordance with FRCP 4(i)(1)(D). Defendants alleged insufficiency of service of process on the grounds of Japan's objection to service by mail under the Hague Service Convention. Without considering the Convention, the court declined to quash service on the ground that "the added defendants, even if not effectively served with process, are at least on notice of ISO's claim."⁹⁹ This approach is most extreme because it ignores the sovereignty of other signatory nations.

2. *The Convention Supersedes Contrary Federal Procedures*

A number of courts have held that the Hague Service Convention supersedes contrary federal procedures. For example, in *Teknekron Management v. Quante Fernmeldetechnik*,¹⁰⁰ an American plaintiff sued a German corporation to enforce obligations under a stock purchase agreement. Plaintiff first served the summons and complaint via first class mail. Realizing that such service was contrary to Germany's objection to service by mail under the Hague Service Convention, plaintiff attempted to effect service a second time. Defendant nonetheless moved to dismiss on the grounds that plaintiff failed to translate the service documents into the defendant's native language as required by the Convention. In quashing plaintiff's service, the court held that "[w]hen an American plaintiff attempts to serve a party located within one of the countries which is a signatory to the Hague Convention, service must be effected strictly according to the procedures set forth in that treaty."¹⁰¹

Similarly, in *Hantover, Inc. v. Omet, S.N.C. of Volentieri*,¹⁰² an Italian defendant objected to plaintiff's request that the court permit service by mail under FRCP 4(i)(1)(E), arguing that "because Italy is a signatory to the Hague Convention . . . Rule 4(i) may not be utilized to obtain service. . . ."¹⁰³ Accepting the proposition that service by mail is impermissible under the Convention, the court held that FRCP 4(i)'s provisions must yield to the requirements of the Convention.¹⁰⁴

Conversely, some courts have held that FRCP 4(i) does not place limits on the operation of the Convention. In *Ackermann v. Levine*,¹⁰⁵ German plaintiffs sought to enforce a foreign judgment in the United States for the recovery of legal fees. The court held that service is valid even though it satisfies only the Convention and not the Federal Rules: "[w]hether Ackermann's service satisfied Rule 4 as it then existed or as it now exists is irrelevant. . . ."¹⁰⁶ Rather, the Hague Service Convention "is manifestly not limited" by FRCP 4;¹⁰⁷ "the United States has made no declaration or limitation to its ratification of the Convention or

99. *Id.* at 1158.

100. 115 F.R.D. 175 (D. Nev. 1987).

101. *Id.* at 176 (emphasis added).

102. 688 F. Supp. 1377 (W.D. Mo. 1988).

103. *Id.* at 1384.

104. *Id.* at 1384-85.

105. 788 F.2d 830 (2d Cir. 1986).

106. *Id.* at 840.

107. *Id.*

otherwise regarding mail service under the Convention."¹⁰⁸

Courts have advanced three reasons for finding that the Hague Service Convention supersedes contrary federal procedure. First, one court adopted an approach where the last statement in time prevails.¹⁰⁹ A self-executing treaty is of equal legal force to federal statutes,¹¹⁰ and where a treaty and a statute conflict, the last in time prevails.¹¹¹ Congress enacted the FRCP 4(i) provisions in 1963¹¹² and the Convention went into force in 1969.¹¹³ Therefore, the Convention prevails.¹¹⁴

Second, two courts have held that the Hague Service Convention supersedes contrary federal procedures because the specific terms of the Convention control the more general provisions of FRCP 4. In *Harris v. Browning-Ferris Industries*,¹¹⁵ the plaintiff contended that the court should resolve conflicts between FRCP 4 and the Convention in favor of FRCP 4 because FRCP 4 was amended in 1983, after Congress ratified the Convention.¹¹⁶ Rejecting plaintiff's contention, the court quashed service for failure to satisfy the Convention: "The Hague Convention applies to all cases where service is to be made in a Foreign country and the countries involved are signatories to the Convention."¹¹⁷ The court clearly indicated that the Convention supersedes Rule 4: "The provisions of Rule 4(i) are intended to cover those instances where service in a foreign country is not prohibited by an international treaty."¹¹⁸ The court arrived at this resolution because the Convention is more specific than FRCP 4(i): "Because the Hague Convention is specific as to how service is to be made in a foreign country and the Federal rules are general and designed to cover all circumstances, the court finds that the provisions of the Hague Convention must control the manner of service in this action."¹¹⁹

The District Court for the District of Columbia also quashed service for failure to follow the more particular requirements of the Convention, even though service notified defendants of the suit: "The statute [FRCP 4(i)] is a general guide, specifying a proper way to effect service

108. *Id.*

109. *Vorhees v. Fischer and Krecke*, 697 F.2d 574 (4th Cir. 1983).

110. *Id.* at 575. *See also* *Cook v. United States*, 288 U.S. 102, 118 (1933) (1924 treaty with Great Britain permitting boarding of vessel by Coast Guard for suspected smuggling supersedes inconsistent provisions of the 1922 Tariff Act, "being later in date"); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other . . . if the two are inconsistent, the one last in date will control the other. . . .").

111. *Vorhees*, 697 F.2d at 575.

112. *Id.* at 576.

113. *Id.*

114. *Id.*

115. 100 F.R.D. 775 (D. La. 1984).

116. *Id.* at 777.

117. *Id.*

118. *Id.* at 778.

119. *Id.* at 777-78.

for every situation. To the contrary, the Hague Convention addresses only the means of effecting service in those foreign countries which have expressly consented to bind themselves to the terms of the Treaty. It is axiomatic that specific terms control general ones."¹²⁰ The court reinforced this judgment by discussing how adherence to the Hague Convention fosters international cooperation and goodwill.¹²¹

Third, the Supreme Court has noted in dictum that the language of the Hague Service Convention's preamble manifests an intention to make the Convention an exclusive source of service of process procedure.¹²² The court noted that the "mandatory language" contained in the Convention's preamble constitutes a "model exclusivity provision," suggesting that future conflicts between the Convention and the Federal Rules would be resolved in favor of applying the Convention's provisions.¹²³

C. The Current Judicial Attempt Is a Failure

The current judicial attempt to reconcile the tension between domestic service provisions and the Hague Service Convention fails for three reasons. First, the cases foster confusion by articulating two very different approaches. Second, the approaches articulated by federal courts do not satisfy principles of American civil procedure law. Third, the approaches do not adequately satisfy the objectives of the Hague Service Convention.

1. *Cases Dealing with the Interplay Between the Hague Service Convention and FRCP 4 Foster Confusion by Articulating Two Very Different Approaches*

The federal judiciary has failed to reconcile the tension between domestic service provisions and the Hague Service Convention. By taking two different positions in attempting to resolve the interplay between domestic service provisions and the Convention, federal courts intensify rather than ameliorate confusion. The inconsistency between the two approaches increases costs by making improper service more probable¹²⁴ and by exposing practitioners to foreign criminal sanctions imposed in some nations for inappropriately serving by mail.¹²⁵

120. *Color Systems, Inc. v. Meteor Photo Reprographic Systems*, 1987 WL 11086 (D.D.C. 1987) (unpublished).

121. *Id.*

122. *Société Nationale*, 107 S.Ct. 2542, 2550-51 n.15 (1987). *See also Volkswagenwerk Aktiengesellschaft v. Schlunck*, 108 S.Ct. 2104, 2111 (1988) ("[C]ompliance with the Convention is mandatory in all cases to which it applies . . .") (dictum). Note, however, that *Volkswagenwerk v. Schlunck* does not address the question of how to reconcile FRCP 4 and the Hague Service Convention. *Schlunck* involved the interplay between the Hague Service Convention and *state law* in the context of serving domestic subsidiaries of a foreign country. Note also that the Supreme Court decided that the Convention *did not* apply.

123. *Société Nationale*, 107 S.Ct. at 2550-51 n.15.

124. *See, e.g., supra* notes 79, 81 and accompanying text.

125. *Supra* note 80.

The federal judiciary's approaches also fail to facilitate the settlement of disputes. By creating inconsistency and unpredictability, the judiciary has increased the likelihood of nonenforcement of a judgment by foreign courts.¹²⁶ Similarly, the multiple approaches adopted by the federal courts and the different approach taken by state courts do not leave the practitioner with a simple or reliable method of service.¹²⁷ These mixed signals from the federal system leave open the question of whether to use the Convention or domestic service provisions. Moreover, though FRCP 4(i) and the Convention were intended to augment judicial cooperation by providing simplicity,¹²⁸ the current judicial approach, insofar as it views the Convention as permissive authority only, will further confuse practitioners by prescribing a different set of resolutions for state and federal courts.¹²⁹

Finally, the current judicial attempt harms parties and practitioners in several ways. The confusion caused by different approaches exposes litigants to statute of limitations problems that may accompany a dismissal for improper service.¹³⁰ The confusion also increases the likelihood of an improper form of service which a foreign court will not recognize when asked to enforce an American judgment.¹³¹ At the very least, defective service wastes time and increases costs.

2. *Neither of the Judicial Resolutions Satisfies Principles of American Civil Procedure Law*

Reading the Convention as an exclusive source of service procedure may be inconsistent with the role of the Federal Rules because it is unclear whether an interpretation of the Convention which preempts FRCP 4 would comply with the Rules Enabling Act ("REA").¹³² The REA deals with the force and effect of statutes that are inconsistent with provisions of the Federal Rules: "(b) . . . All laws in conflict with such rules shall be of no further force and effect after such rules have taken effect. . . ."¹³³ Under the REA, Federal Rules supersede inconsistent federal statutes in effect at the time of enactment of the Federal Rules or of an amendment

126. Unpredictability increases the likelihood for mistakes in service offensive to the laws of foreign nations. For the repercussions of such mistakes, see *supra* notes 78-81.

127. Yet, this is one of the most important goals of the Hague Service Convention. See *supra* note 42 and accompanying text.

128. *Supra* notes 26, 42.

129. Compare *supra* notes 83-86 and accompanying text with *supra* notes 91-99 and accompanying text.

130. See *supra* note 81.

131. *Supra* note 78.

132. Judicial Improvements and Access to Justice Act of 1988, § 401, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (amending 28 U.S.C. § 2072 (1982)).

133. Judicial Improvements Act, § 401(b), Pub. L. No. 100-702 (1988) (emphasis added).

thereto.¹³⁴ The Federal Rules, however, are superseded by subsequently enacted statutes clearly inconsistent with the Federal Rules, "unless the rule-making power is later augmented so that it in turn may supersede the statute."¹³⁵ Statutes that are not *clearly* inconsistent should be harmonized with the Federal Rules.¹³⁶ These methods of resolving conflicts under the REA should apply to the Hague Service Convention because such a self-executing treaty has the same force and effect as a federal statute.¹³⁷

Under the REA, the Hague Service Convention would not supersede or preempt the more flexible scheme of FRCP 4(i), despite the insistence by some federal courts that the Convention supersedes FRCP 4(i) because the specific terms of the Convention control the more general provisions of FRCP 4(i).¹³⁸ First, assuming that the Convention and FRCP 4(i) are not *clearly* inconsistent, reading the Convention to be the exclusive source of service procedure does not harmonize Rule 4(i) and the Convention because such a reading *completely* sacrifices the flexible scheme and *ad hoc* approach intended by Congress under FRCP 4(i); exclusive use of the Convention decreases the freedom that parties and courts have for tailoring a method of service to meet particular exigencies, which is especially troublesome where the Convention proves ineffective because of some oversight on the part of the drafters. As this Note will argue, a rule of first resort is a more effective approach for satisfying American obligations under the Convention and for ensuring the flexibility under Rule 4(i). Second, even if Rule 4(i) and the Hague Service Convention were clearly inconsistent, Rule 4(i) would nonetheless supersede the Convention, which has been in force since 1969, because the rule-making power was exercised later in 1983 through an amendment to Rule 4.¹³⁹

134. 2 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 1.02[5] (2d ed. 1988). See *Griffith Co. v. N.L.R.B.*, 545 F.2d 1194, 1197 n.3 (9th Cir. 1976) (conflict between 28 U.S.C. § 2107 and FED. R. APP. P. 4), *cert. den.* 434 U.S. 854 (1976).

135. 2 J. MOORE, *supra* note 134.

136. 3 J. PALMER, *CYC. FED. PROC.* § 8.02 n.3 (3d ed. 1985).

137. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation"); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847, 850 n.1 (W.D. Tex. 1988) (Hague Service Convention is self-executing).

138. See *supra* text accompanying notes 115-21.

139. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983). This, however, is a weak argument because FRCP 4(i) was not amended by the 1983 Amendments. Plaintiffs nonetheless took this position in *Harris v. Browning-Ferris Industries*, 10 F.R.D. 775 (D. La. 1984), but were rebuffed by the court on the grounds that the more specific terms of the Convention control over the more general provisions of FRCP 4(i). However, the REA was not raised by either the court or the plaintiffs and therefore did not enter into consideration of the issue. The last in time analysis adopted by the court in *Forhees*, discussed *supra*, at text accompanying notes 109-14, which resulted in application of the Convention rather than FRCP 4(i), is not inconsistent with the position posed by this Note under the REA because the case predated the 1983 Amendments to FRCP 4.

Moreover, from a practical perspective, reading the Convention as merely permissive authority in all cases would place greater hardship on American parties serving abroad. Such an approach only offers answers about sufficiency of service after already attempting service, thereby making the appropriate method of service unpredictable and encouraging protracted disputes to decide whether service is insufficient. An *ad hoc* approach also makes the litigant's job much more difficult by permitting each federal district to approach the interplay between FRCP 4(i) and the Convention with different balancing techniques¹⁴⁰ or different results.

Finally, a supplementary approach may treat parties unequally. Both federal and state courts have held that the Convention supersedes state law under the Constitution's Supremacy Clause.¹⁴¹ By interpreting the Convention as a permissive supplement, however, federal courts could permit service by mail under FRCP 4 in foreign nations objecting to this method under Article 21, whereas state courts, bound by the Convention, could not permit such service.

This is the sort of unequal treatment that federal courts have shunned when discussing forum shopping and discrimination between similarly situated parties. Requiring exclusive use of the Convention in state court but treating the Convention as a permissive supplement in federal court treats similarly situated parties differently in identical litigation. A party serving by mail in state court may face dismissal under the Convention for ineffective service while a plaintiff suing the same foreign party in federal court could effect service through FRCP 4(i) without resorting to the Convention. These are the sorts of problems that federal courts should avoid rather than intensify when deciding which law governs.¹⁴²

3. Both Approaches Articulated by Federal Courts Fail to Satisfy the Goals of the Hague Service Convention

Both approaches articulated by the federal judiciary are inadequate because they fail to represent accurately the meaning of the Convention. Before delving into the specific reasons for the failure of both approaches, however, it is necessary to examine the language and purpose of the Convention.

140. The Supreme Court opened the floodgates for varying and inconsistent balancing techniques among different federal courts with respect to the Hague Evidence Convention when it stated that "we do not articulate specific rules to guide this delicate task of adjudication." *Société Nationale*, 107 S.Ct. at 2557.

141. See *DeJames v. Magnificence Carriers*, 654 F.2d 280, 288-89 (3d Cir. 1981) ("By virtue of the supremacy clause, the treaty overrides state methods of serving process abroad that are objectionable to the nation in which the process is served"). See also *supra* notes 83-86, 100-23 and accompanying text.

142. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 73-75 (1938) (discussion of forum shopping and discrimination evils).

a. **Obligatory Nature of the Convention: An Excursus into Language and Purpose**

The language and drafting history of the Hague Service Convention indicate that the Convention is mandatory authority in the courts of signatory nations. First, the Convention uses obligatory rather than permissive language. According to Article 1, the Hague Service Convention “shall apply in *all* cases, in civil or commercial matters. . . .”¹⁴³ The Conference’s use of mandatory language in the Hague Service Convention is significant given the Conference’s use of permissive language in the Hague Evidence Convention.¹⁴⁴

Second, Article 19 of the Convention, inserted at the request of the United States, seems to prohibit, by negative implication, a plaintiff’s use of its own country’s broader domestic service provisions rather than the Convention to effect service upon a foreigner:

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, *of documents coming from abroad, for service within its territory*, the present Convention shall not affect such provisions.¹⁴⁵

Article 19 basically provides that the Convention does not prohibit a foreign plaintiff from using state or federal domestic service procedures broader than the Convention when serving an American in the United States, but does not provide that an American can use domestic provisions broader than the Convention to serve a defendant from another country. The service documents are not “coming from abroad” and will not effect service “within its [the American’s] territory.”

Third, the history of the Hague Service Convention’s drafting indicates that the Conference changed its intention from permissive to mandatory authority. Though the Conference indicated that the “Convention establishes more of a freedom than an obligation” in its explanatory report to the first draft,¹⁴⁶ the delegates made certain revisions

143. Service Convention, *supra* note 42, at art. 1 (emphasis added).

144. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, Preamble, 23 U.S.T. 2555, 2557, T.I.A.S. No. 7444, 847 U.N.T.S. 231 (preamble speaks in permissive terms by stating that the purpose of the Hague Evidence Convention is to “facilitate” and “improve” discovery involving foreign parties). Article 1 of the Convention also contains permissive language: “. . . a judicial authority . . . may . . . request the competent authority of another [c]ontracting [s]tate, by means of a Letter of Request, to obtain evidence.” *Id.* at art. 1 (emphasis added). For an analysis of this contrast, see *Société Nationale*, 107 S.Ct. 2542, 2550-51 n.15 (1987) (Hague Conference consciously distinguished between mandatory and permissive language in drafting conventions).

145. Service Convention, *supra* note 42, at art. 19.

146. 1 B. RISTAU, *supra* note 32, at § 4-10. At the time of the first draft, the delegates felt that it was “extreme to impose an obligation to follow the Convention route in every case where the person to be served was in a foreign country.” *Id.* Moreover, “it was thought that it was up to the law of the forum state to prescribe under what circumstances resort should be made to the Convention. . . it would not be proper . . . to limit . . . the judge.” *Id.* In effect, “the Convention needs to be applied by a contracting state only if the law of that state says so.” *Id.*

during the plenary session "to make it clear that the Convention machinery must be employed in all cases where service abroad is sought."¹⁴⁷

Yet, where the Convention will not work because of a drafting oversight or because the procedures are not equipped to effect timely service in a particular situation, it is not clear that the Convention would prohibit the use of broader state or federal procedures by an American upon a foreigner. Though the language and drafting history of the Convention suggest that the Convention is obligatory, the broader purposes of the Convention strongly suggest that the Convention would permit resort to domestic service provisions where the Convention would not effect service and thereby deprive a plaintiff of the ability to sue.

The purpose of the Convention is "to ensure that judicial and extra-judicial documents to be served abroad shall be brought to the notice of the addressee *in sufficient time*."¹⁴⁸ The procedures of the Convention are intended "to improve the organization of mutual judicial assistance *for that purpose* by simplifying and expediting the procedure."¹⁴⁹ Requiring strict adherence to the Convention even where timely and adequate notice could not be accomplished under its procedures would not advance the objective to facilitate international litigation in an environment of mutual judicial assistance.

Moreover, despite the language of the Convention, language and drafting history are not the only sources aiding interpretation of treaties under United States law. United States courts must consider the Senate's understanding of a treaty or convention, as revealed by committee reports, debates and other sources of legislative history.¹⁵⁰ In ratifying the Convention, the Senate was sensitive to the need of protecting the due process rights of American citizens involved in international litigation.¹⁵¹ It is implausible to suggest that the Senate could have been so concerned about the posture of American citizens in international litigation, and yet could have ratified a Convention which would deprive an American plaintiff of the ability to initiate a lawsuit where the plaintiff could not effect service because of inadequate Convention procedures.

The Senate also believed that the Convention was consistent with the spirit of the laws in force at the time, such as FRCP 4(i), which guar-

147. *Id.* At the time of the final draft, the delegates concluded that "the Convention machinery is obligatory" and "where a contracting state formally objects to any manner of service . . . the conventional route becomes the exclusive method of service in that state." *Id.*

148. Service Convention, *supra* note 42, at Preamble.

149. *Id.*

150. For a discussion of the need to consider the Senate's understanding of the meaning of a treaty or convention, see *infra* note 154.

151. S. EXEC. REP. NO. 6, *supra* note 4, at 3, 9 ("[The Convention] will provide increased protection (due process) for American citizens who are involved in litigation abroad") ("[The Convention] gives to our people, whether litigating rights in State or Federal courts, a very useful tool in furthering a fair determination of their rights").

anteed flexibility to meet the special exigencies of serving abroad.¹⁵² Thus, an obligatory Convention which required strict adherence regardless of the circumstances could not have been envisioned by the Senate.

The Senate's understanding is in fact consistent with the object and purpose of the Convention, two other important indicia of treaty meaning. The Convention is aimed at facilitating expeditious service, guaranteeing enforceable judgments and decreasing the number of default judgments.¹⁵³ The drafters of the Convention, however, could not have foreseen every problem that would impede service abroad and enforceable judgments. Situations therefore will arise where the provisions of the Convention will not facilitate effective service and will fail to guarantee an enforceable judgment. Permitting resort to other service procedures ensures that domestic law can be used to fill gaps in the Convention and thereby guarantee enforceable judgments free from collateral attack in situations not adequately addressed by the Convention's drafters.

b. Problems with Reading the Convention as Mandatory Authority in All Cases

United States courts and the Executive Branch must give effect to the Senate's understanding of a treaty or convention.¹⁵⁴ A reading of the Hague Service Convention which mandates exclusive resort to the Convention, however, is not consistent with the Senate's understanding at the time of ratification that Americans must receive generous protections in the context of international litigation and that the Convention would provide flexibility similar to existing U.S. law.¹⁵⁵ Thus, interpreting the Convention as an exclusive source of service procedure violates the standard of judicial deference to Senate understanding and thereby raises serious separation of powers questions.

Moreover, reading the Convention as an exclusive source of service procedure is not necessarily consistent with the Convention's object and purpose. The Hague Conference drafted and adopted the Hague Service Convention to facilitate expeditious service and reduce the number of default judgments in some other foreign court.¹⁵⁶ Thus, the Convention's main goal is to ensure that the complexities of service abroad do not impede fair and efficient litigation among parties from different nations. Yet, interpreting the Convention to preclude resort to any other provisions which grant broader and more generous service would

152. See S. EXEC. REP. NO. 6, *supra* note 4, at 7 (based on a statement from the Judicial Conference of the United States).

153. See *supra* notes 42-44 and accompanying text.

154. 1 RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 314, comment d, § 325 n.5 ("A court or agency of the United States is required to take into account United States materials relating to the formation of an international agreement . . ."). See also *id.* at § 326 comment a (" . . . understandings expressed by the Senate in giving its advice and consent must be respected").

155. See *supra* notes 151-52 and accompanying text.

156. See *supra* text accompanying notes 42-44.

not advance the successful and simple resolution of international litigation in cases where the Convention's procedures do not effect timely and adequate service because of some oversight on the part of the Hague Conference.

c. Problems with Interpreting the Convention as Merely Supplementary

Reading the Convention as permissive or supplementary, regardless of whether the Convention's provisions are capable of effecting service, violates the language and purpose of the Convention. The Convention's preamble makes two important statements. First, the Convention must be applied when serving abroad. Second, the purpose of the Convention is to facilitate the resolution of international litigation free from collateral attack. At the very least, therefore, the Convention must be used where its procedures will effect adequate service which will enable a plaintiff to initiate international litigation and ultimately to obtain an enforceable judgment. Reading the Convention as a mere supplement to domestic law ignores this strong presumption of use. Similarly, interpreting the Hague Service Convention as permissive, and thereby frustrating the goals of the Convention, may ultimately be a disservice to litigants. The Convention's drafters sought to prescribe means of service which would avoid default judgments and withstand collateral attack in enforcement suits.¹⁵⁷

The Senate also sought to ensure that American citizens receive adequate protection when suing or being sued in foreign courts.¹⁵⁸ Labelling the Convention as "permissive" may give American plaintiffs the false impression that they can ignore the provisions of the Convention and still enforce judgments abroad. Moreover, if the United States is unwilling to comply with the Convention, it is less likely that foreign jurisdictions will be enthusiastic about providing American citizens with the utmost cooperation and protection.

III. Adopting a "Rule of First Resort" to Deal with Confusion Regarding the Interplay Between FRCP 4(i) and the Hague Service Convention

To remedy confusion regarding the interplay between FRCP 4(i) and the Hague Service Convention, the United States should institute a "rule of first resort", an approach adopted by the concurrence in *Société Nationale v. U.S. Dist. Ct., S. D. Iowa*,¹⁵⁹ to deal with a related conflict between federal discovery rules and the Hague Evidence Convention. Under this approach, the plaintiff first must attempt to serve under the

157. See *supra* notes 43-44 and accompanying text.

158. See *supra* note 151 and accompanying text.

159. 107 S.Ct. 2542 (1987). This approach arguably was adopted by at least one federal district court. *Cooper v. Makita*, Civ. No. 87-0053-P, slip op. (D. Me. Sept. 24, 1987) (unpublished).

Hague Service Convention before resorting to more flexible and permissive domestic service procedures.

Société Nationale and the concurring opinion therein are useful for discussing the interplay between FRCP 4(i) and the Hague Service Convention because *Société* addressed an identical issue in a different context: how should American courts reconcile conflicts between a federal rule and a self-executing treaty to which the United States is a party? This Note, however, does not attempt to argue that the concurring Justices in *Société* would apply the rule of first resort in the service context. In fact, there is no reason to believe that the concurrence disagreed with the majority's suggestion in dictum that the Hague Service Convention may be the exclusive mechanism for serving foreign parties located in signatory nations. This Note nonetheless contends that the rule of first resort is the appropriate approach in the service context for the reasons stated in Part III-B.

A. *Société Nationale*—Background and Discussion

In *Société Nationale* the United States Supreme Court addressed the interplay between the Federal Rules relating to discovery and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters¹⁶⁰ adopted by the United States¹⁶¹ and sixteen other countries.¹⁶²

American plaintiffs to the original action ("Plaintiffs") purchased an aircraft designed, manufactured and marketed by a French corporation ("Petitioner").¹⁶³ The plane crashed in Iowa, and Plaintiffs sued Petitioner for negligence and breach of warranty.¹⁶⁴

Plaintiffs initiated discovery under FRCP 34(b) and 36 by requesting the production of documents and certain admissions.¹⁶⁵ Though Petitioner complied with these requests,¹⁶⁶ it sought a protective order when Plaintiffs delivered a second request for the production of documents under FRCP 34, answers to interrogatories under FRCP 33, and admissions under FRCP 36.¹⁶⁷ Petitioner argued that the Hague Evidence Convention rather than the Federal Rules exclusively applied to the pretrial discovery procedures because (1) Petitioner was a corporation based in a nation that signed the Evidence Convention, and (2) the

160. Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter "Evidence Convention"].

161. Ratified by the U.S. Senate unanimously in 1972. 118 CONG. REC. 20,623 (1972).

162. OFFICE OF LEGAL ADVISER, U.S. DEPT. OF STATE, TREATIES IN FORCE 261-62 (1986) (Barbados, Cyprus, Czechoslovakia, Denmark, Finland, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Singapore, Sweden, France, West Germany, and the United Kingdom).

163. *Société Nationale*, 107 S.Ct. at 2546.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

requested discovery material was found in France.¹⁶⁸

The Supreme Court considered the following issue: to what extent must a federal district court employ the procedures set forth in the Hague Evidence Convention when domestic litigants seek answers to interrogatories, production of documents and admissions from a foreign adversary? The Court began its analysis by outlining four possible approaches. First, the Evidence Convention could serve as mandatory authority, i.e., to be used exclusively whenever evidence located abroad is sought for use in American courts.¹⁶⁹ Second, the Court could adopt a rule of "first use", i.e., look to the Convention first, and resort to the Federal Rules only if the Convention proves unproductive or futile.¹⁷⁰ These first two approaches are formalistic because they are predicated upon the existence of and adherence to a treaty obligation.¹⁷¹ Third, the Court could view the Convention as supplementary and optional, "to which concerns of comity nevertheless require first resort by American courts in all cases."¹⁷² This approach views the Evidence Convention as supplementary, but also anticipates an analysis which ultimately requires first using the Convention Rules, given the interest in international cooperation and convenience. Fourth, the Court could invoke an *ad hoc* balancing approach. Under this approach, the Convention's purpose is merely to facilitate discovery.¹⁷³ Thus, a court should only use the Convention when "appropriate," i.e., when the situation of the parties, interest of the United States, and interest of the foreign state warrant application of the Evidence Convention Rules.¹⁷⁴

The Court ultimately adopted the fourth approach, concluding that the Evidence Convention is a permissive supplement rather than a preemptive replacement of the Federal Rules intended to establish *optional* procedures for facilitating the collection of evidence abroad.¹⁷⁵ Thus, the Court rejected the extreme approach that the Evidence Convention is either exclusive (as suggested by Petitioner at the District Court) or inapplicable when jurisdiction exists (as held by the Eighth Circuit).

Justice Blackmun authored a separate opinion joined by Justices Brennan, Marshall, and O'Connor which disagreed with the majority's reasoning and which proposed a rule of first resort, thereby establishing a general presumption that courts must first resort to the Evidence Convention.¹⁷⁶ Only if there is a strong indication that the Convention is unproductive or futile in a particular case should the court engage in an individualized interest analysis.¹⁷⁷

168. *Société Nationale*, 107 S. Ct. at 2546.

169. *Id.* at 2550.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Société Nationale*, 107 S. Ct. at 2550.

174. *Id.*

175. *Id.* at 2554-55.

176. *Id.* at 2558.

177. *Id.*

The four justices disagreed with the majority for several reasons. First, courts are neither equipped nor empowered to engage in the comity analysis required by the majority's *ad hoc* balancing approach.¹⁷⁸ Courts are not equipped to engage in a neutral balancing of foreign interests because very few American judges understand foreign legal systems, realize what actions will offend foreign sovereigns, or deal frequently with the intricacies of transnational litigation.¹⁷⁹ Moreover, given that the Convention represents a balance of interests already determined by the Legislative and Executive Branches of government, it would offend the Constitution's separation of powers for a court to ignore the political determination embodied by the Convention and engraft its own vision of the national interest.¹⁸⁰ Second, Justice Blackmun argued that the majority failed to acknowledge adequately the international obligations undertaken by the United States in ratifying the Convention¹⁸¹ and clearly dictated by the legislative history of the Convention.¹⁸² Third, it is in the interest of the United States to comply with the Convention.¹⁸³ Fourth, even if courts engaged in case-by-case interest analysis as prescribed by the majority, this analysis should lead courts to use the Evidence Convention.¹⁸⁴

B. Applying the Rule of First Resort to the Service Context

The rule of first resort adopted in Justice Blackmun's opinion would work well in the service context. A rule of first resort satisfies the purposes of both the Convention and FRCP 4(i) as well as the goals underlying the principle of international comity.

1. *The Rule of First Resort Would Satisfy the Purposes of the Convention and FRCP 4(i)*

A rule of first resort is consistent with the purposes underlying both the Convention and FRCP 4(i). The approach departs from the Convention only when reading the Convention as mandatory authority would cir-

178. *Société Nationale*, 107 S. Ct. at 2558, 2560.

179. *Id.*

180. *Id.*

181. *Id.* at 2558-59.

182. *Id.* at 2559.

183. *Id.* These interests include "channels for discovery abroad that would not be available otherwise . . . helping to further and to maintain the climate of cooperation and goodwill necessary to the functioning of the international legal and commercial systems." *Id.*

184. *Id.* at 2562 ("Although this analysis is unnecessary in the absence of any conflicts, it should lead courts to the use of the Convention if they recognize that the Convention already has largely accommodated all three categories of interests relevant to a comity analysis—foreign interests, domestic interests, and the interest in a well-functioning international order"). Foreign interests include the sovereign interests of foreign nations. *Id.* at 2562-63. United States interests include "providing effective procedures to enable litigants to obtain evidence abroad" and "fair and equal treatment of litigants." *Id.* at 2564-67. The interest in a well-functioning international legal order includes "predictability, fairness, ease of commercial interactions, and 'stability through satisfaction of mutual expectations.'" *Id.* at 2568.

cumvent or fail to advance the purposes of the Convention. Moreover, by creating a presumption that the Convention prescribes the appropriate manner of service, the rule of first resort offers a simple, reliable, and predictable approach for serving foreign parties in the vast majority of cases.¹⁸⁵

A supplementary approach does not leave parties with any uniform standards from which *ex ante* determinations can be made about the force and effect that the Convention will have in a particular case. In the case of a rule of first resort with a strong presumption of use, however, parties will know that the Convention applies absent some objective inability to serve under the Convention. Moreover, unlike a rule of first resort which, by virtue of the strong presumption of use, has already incorporated a balance of interests, a supplementary approach provides courts with absolutely no guidance about various interests and therefore requires each court to engage in a *de novo* analysis of the interests of parties, the United States, and foreign nations. Courts are not equipped to make routinely the foreign policy judgments that would enter into such a balance. Permitting courts to engage in *ad hoc* balancing analyses without any guiding principle would not guarantee the unitary approach sought by the Senate in ratifying the Convention.

A strong presumption of first use also acknowledges the existence of a treaty obligation, and thereby maintains the spirit of cooperation with foreign nations mandated by the Convention.¹⁸⁶ Yet, by permitting resort to more generous domestic service provisions where the plaintiff can prove that Convention procedures will fail to effect timely and adequate notice through no fault of plaintiff's litigation strategy, the rule of first resort also correctly acknowledges the need for flexibility in American courts.¹⁸⁷

Flexibility not only represents the overall objective of FRCP 4(i), but also advances the Convention's objectives by providing additional maneuverability to avoid unenforceable judgments in cases inadequately handled by the Convention's procedures. Such flexibility does not deny the existence of a treaty obligation or disregard the procedures of foreign nations. First, the use of more generous procedures for service beyond the Convention's provisions can in fact advance international judicial cooperation by facilitating international litigation which, because of the ineffectiveness of the Convention in a particular case, would not otherwise come to fruition. Second, it is inappropriate to presuppose that departing from Convention procedures will lead to an insensitivity to the laws of foreign nations. In framing a method of service outside of the Convention, a court should remain sensitive to a for-

185. These are important goals of the Convention. See *supra* note 41 and accompanying text.

186. *Id.* This also is an important goal of the Convention. See *supra* note 42 and accompanying text.

187. Flexibility is an important purpose underlying FRCP 4(i). See *supra* note 26 and accompanying text.

eign sovereign's law in order to ensure that the judgment will be enforceable in the foreign nation if necessary. Thus, the rule of first resort preserves the cooperation and accommodation vital under the Convention as well as the flexibility characteristic of FRCP 4(i).

The rule of first resort accommodates both the Hague Conference's intentions and the Senate's understanding of the Convention. Such an approach would accommodate the Hague Conference's intention that the Convention obligate the courts of all signatory nations¹⁸⁸ because the presumption of use articulated by a rule of first resort acknowledges the international treaty obligations which accompanied ratification of the Convention.¹⁸⁹

This approach also would comport with the Senate's understanding that the Convention would not abrogate FRCP 4 and would not preclude the use of more generous service procedures in the future.¹⁹⁰ The rule of first resort does not imply that the Convention supersedes FRCP 4(i). Rather, as the Senate intended, a rule of first resort would permit the two service provisions to work together in providing a variety of permissible service methods where domestic law provided more liberal procedures than the Convention, which is especially vital where the Convention does not adequately address particular service problems.

The rule of first resort preserves the flexibility and independence of American courts by permitting departure from the Convention where the Convention's methods fail to effect timely and adequate notice. The rule of first resort, however, can embrace a presumption of use strong enough to preserve comity and uniformity under the Convention. The party seeking to depart from the Convention, for instance, could be required to prove that, by no fault of its own, the Convention would not effect adequate and timely notice.¹⁹¹ Such a stringent approach would minimize the likelihood of offending foreign nations in a manner which would jeopardize the international judicial cooperation intended by the Convention.

2. *The Rule of First Resort Satisfies the Goals of International Comity*

Comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."¹⁹² It is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."¹⁹³ Rather than "a vague political concern,"¹⁹⁴ comity encour-

188. See *supra* notes 146-47 and accompanying text.

189. See *Société Nationale v. U.S. Dist. Ct. S.D. Iowa*, 107 S.Ct. 2542, 2550 (1987).

190. See *supra* note 152 and accompanying text.

191. Under this formulation, a party would have to show that the Convention does not adequately address exigencies of the particular case and that litigation strategy such as the filing of the case close to the tolling of the statute of limitations was not the cause of the Convention's ineffectiveness.

192. See *Société Nationale*, 107 S.Ct. at 2555 n.27.

193. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (foreign judgment as *prima facie* evidence unless party shows special grounds for impeachment).

ages tolerance, goodwill, and vital cooperation among foreign nations.¹⁹⁵ Comity requires "due regard both to international duty and convenience, and to the rights of . . . citizens or of other persons who are under the protection of . . . laws."¹⁹⁶

The principle of comity defies any sort of mechanical application or approach.¹⁹⁷ However, courts and commentators typically assess foreign interests,¹⁹⁸ domestic interests,¹⁹⁹ the interest in a smoothly functioning international legal order,²⁰⁰ and the extent of the hardship to affected parties.²⁰¹

The rule of first resort would be consistent with the interest in international comity if applied to the service context. First, the rule of first resort substantially preserves the sovereignty of other foreign nations without entirely sacrificing an American plaintiff's ability to hail foreign defendants into American courts. By following the procedures and objections enumerated in the Convention, except where such provisions fail to satisfy the general objectives and purposes of the Convention in providing adequate notice and facilitating international litigation, American courts would be acknowledging the United States's obligation under the Convention to respect a foreign nation's authority to regulate service upon its citizens. The rule of first resort, by recognizing the existence of a treaty obligation, respects the perception of some nations that service within their boundaries is a sovereign act that other countries cannot exercise freely.²⁰² Moreover, it is important to note that departing from the provisions of the Convention does not automatically offend the sovereignty of foreign nations; an alternative method of service tailored by a court for a particular case certainly could, and in fact should, take into account the foreign sovereign's internal laws. In fact, a court which ignored such foreign internal law would not be satisfying the Convention's goal of ensuring enforceable judgments in foreign jurisdictions.

Second, the rule of first resort advances United States interests. American courts would be able to protect American litigants who have

194. *Société Nationale*, 107 S.Ct. at 2561 (Blackmun, J., dissenting in part).

195. *Id.* See also *S & S Screw Machine Co. v. Cosa Corp.*, 647 F. Supp. 600, 615 (M.D. Tenn. 1986) (applies rule of first resort to Hague Evidence Convention).

196. *Hilton*, 159 U.S. at 164.

197. See *Société Nationale*, 107 S.Ct. at 2555 n.28; *S & S Screw Machine Co.*, 647 F. Supp. at 615 ("comity resists mechanical formulae").

198. See *Société Nationale*, 107 S.Ct. at 2555-56, 2562; *S & S Screw Machine Co.*, 647 F. Supp. at 616 n.31; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

199. See *Société Nationale*, 107 S.Ct. at 2562, 2564-67; RESTATEMENT (SECOND), *supra* note 197, at § 40.

200. See *Société Nationale*, 107 S.Ct. at 2562, 2567-68.

201. See RESTATEMENT (SECOND), *supra* note 198, at § 40 (1965).

202. See *Smit*, *supra* note 78, at 1040 ("the opposition of foreign countries to the making of service within their borders ordinarily stems from the notion that the making of service is the official act of a foreign sovereign and should not be countenanced in the absence of treaty").

attempted to serve under the Hague Service Convention but, because of an oversight on the part of the Hague Conference or peculiar exigencies, were unsuccessful in effecting service. Moreover, unlike the current confusion which leads to the unequal treatment of similarly situated parties, adopting a rule of first resort would finally ensure uniform application of the Convention. By adopting an amendment to the Federal Rules that would incorporate this rule of first resort, all federal courts would apply the Convention consistently. Moreover, in adopting such an amendment, the Supreme Court would be rendering an interpretation of the Convention binding on state courts as well.²⁰³

Third, a rule of first resort satisfies international comity by fostering a smoothly functioning international legal system. The rule of first resort provides predictability, reliability, and fairness to similarly situated parties by demonstrating that the Convention is the primary source of service procedures, rebutted only after meeting a substantial burden of proof. Moreover, the rule of first resort advances the functioning of the international legal system by permitting flexibility in situations inadequately addressed by the Convention; such a gap-filling function, if sensitive to a foreign sovereign's laws, can reduce the likelihood of unenforceable judgments and time-consuming collateral attacks.²⁰⁴ A rule of first resort would not frustrate the expectations of other signatory nations because it guarantees compliance except in the most extraordinary situations.

IV. Amending the Federal Rules to Establish an Interplay Between Domestic Service Provisions and the Hague Service Convention

An amendment to the Federal Rules of Civil Procedure incorporating the Convention by reference to a rule of first resort would efficiently and equitably resolve the interplay between domestic and international service rules.

In 1984, the Advisory Committee to the Federal Rules of Civil Procedure, in an effort to harmonize the Federal Rules and the Convention, proposed an amendment to FRCP 4(i).²⁰⁵ The amendment would have added a new clause permitting service "pursuant to any applicable treaty or convention."²⁰⁶ The accompanying notes indicated that "to the extent that the procedures set out in the Hague Convention . . . conflict with the Federal Rules of Civil Procedure, subdivision (i)(l)(E) harmo-

203. 1 RESTATEMENT (THIRD), *supra* note 154, at § 326 comment d ("An international agreement to which the United States is a party is the supreme law of the land The interpretation of such an agreement, therefore, is a matter of federal law and binding on the courts of the several states").

204. *See, e.g., S & S Screw Mach. Co.*, 647 F.Supp. at 618 ("The proposed approach would provide greater predictability to the litigants, thus manifesting a 'greater sensitivity to the need of the international commercial system for predictability in the resolution of disputes. . . .'").

205. *See* FED. R. CIV. P. 4(i) Supplementary Practice Commentary—1985 C4-34 (U.S.C.A. Supp. 1988).

206. *Id.*

nizes them.”²⁰⁷ This proposal, however, would have failed to harmonize the Convention and domestic service provisions. Instead, it would have had just the opposite effect. The proposal suggested that the Convention is a permissive supplement to the five other methods already enumerated in FRCP 4(i). Furthermore, merely appending the proposal to the already existing 4(i) methods could give practitioners the impression that the other methods of service are available notwithstanding the Convention.²⁰⁸

To avoid this additional confusion, the Advisory Committee should propose, and the Standing Committee on Rules and Procedures should adopt, an amendment to FRCP 4(i) prescribing first resort to the Convention where a plaintiff attempts to effect service in a signatory nation:

Rule 4(i). [Alternative] Provisions for Service in a Foreign Country.

(1) *Manner of service when serving in a foreign country which is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country which is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, the party wishing to effect service shall comply with the terms of the Hague Convention. If, after having attempted service under the Convention or after having inquired of a central authority as to the amount of time needed for approval of a service request, a party wishing to serve abroad demonstrates that timely service reasonably calculated to give notice is not possible under the Convention because (i) the Convention could not have effected timely service even where Convention procedures were initiated 30 days after commencement of the applicable statute of limitations period or (ii) none of the methods of service permissible under the Convention or found under the foreign signatory's internal law are reasonably calculated to secure delivery of notice or of a summons, then the party wishing to effect service may serve: (A) by verifiable mail as defined by subdivision (3) so long as there is no specific reservation to delivery via postal channels by the signatory nation in which the party to be served is located or (B) in a manner directed by order of court.*

(2) *Alternative Methods of Service when serving in a foreign country which is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country which is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, in addition to the methods permitted under subdivision (e) of this rule, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an*

207. *Id.*

208. *Id.* See also National Law Journal, Feb. 4, 1985, at 28.

action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of *verifiable* mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court, or (E) as directed by order of the court.

(3) *Service by verifiable mail:* (A) Service by mail *under subdivisions* (1)(A) and (2) may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. [(2)] (B) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. Proof of service by mail shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

Rule 4(e). Summons: Service upon Party Not Inhabitant of or Found Within State.

*Except in cases covered by subdivision 4(i)(1), dealing with manner of service in a foreign country which is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.*²⁰⁹

209. Italicized material indicates additions and bracketed material indicates deletions. The Advisory Committee to the Federal Rules of Civil Procedure has in fact proposed a similar amendment. See Proposed Amendment to Rule 4 of the Federal Rules of Civil Procedure (Dec. 10, 1988) (filed in Administrative Office of the United States Courts, Washington, D.C.).

The proposal set forth in this Note, however, is different in two respects. First, unlike the amendment proposed by the Advisory Committee, this Note recommends that foreign service provisions remain neatly divided under FRCP 4(i). The 1963 drafters created a separate section for foreign service to underscore or "amplify" the special considerations that must be taken into account when serving abroad. FED. R.

This proposal has several important features. First, it follows the 1963 drafters' intention to amplify the special complexities surrounding service in a foreign country by placing all matters relating to service in a foreign country within one clearly marked section.

Second, the proposal establishes a strong presumption that the Hague Service Convention applies when serving a party located in a signatory nation. To challenge this presumption, the party wishing to effect service must either have attempted service under the Convention or inquired into the amount of time needed for a Central Authority to act on a service request. Requiring attempted service under the Convention or a documented inquiry to a Central Authority not only establishes a party's good faith in attempting to comply with the Convention, but also provides objective evidence for the court to determine whether service under the Convention is in fact not possible. A party can only rebut the presumption of first use if it demonstrates that service is not

CIV. PROC. 4(i) (advisory committee note of 1963). Merely tacking foreign service provisions onto some other Rule 4 subdivision would not highlight these special considerations. Moreover, the proposal set forth in this Note reduces confusion by retaining the current structure of Rule 4—practitioners and the bench would not have to contend with structural revisions upsetting the interplay between subdivisions with which the legal community has been acquainted for over two decades. Moreover, the proposal set forth in this Note neatly divides service methods pertaining to signatory and non-signatory nations, thereby underscoring the impact of the United States treaty obligation.

Second, unlike the Advisory Committee's version, the proposal advanced by this Note provides a different focus on the respect to be accorded to the methods of delivery available under the Convention. Unlike this Note, the Advisory Committee Proposal seems to sacrifice the Central Authority system, which, in some cases, will not guarantee effective service, for an escape provision guaranteeing that every American will be able to serve abroad. The Advisory Committee's proposal permits resort to non-Convention sources when six months have lapsed from the date of requesting action by a Central Authority and service has not yet been effected. Such an ultimatum has the potential for offending foreign nations, particularly in light of the short turn-around period prescribed by the Advisory Committee's proposal. For instance, in a case where a party has requested service, and, at the end of the six-month period, the Central Authority has rejected the party's proposed method, the Advisory Committee approach would permit a court to order service rather than require the party to find a method amenable to the foreign signatory. Disregarding Central Authorities in such cases has the potential of increasing, not decreasing, unenforceable judgments, a condition fundamentally at odds with the purpose of the Convention. Moreover, the Advisory Committee proposal locks parties into a six-month waiting period. Under the proposal advanced by this Note, a party can show that the Convention will not work at any time during the litigation. This flexibility can be particularly helpful to plaintiffs who have a short limitations period and who, after proving that the Convention will not work, will need time to develop a strategy for serving and to re-serve if the specially tailored strategy fails and needs to be perfected.

Finally, a six-month period is unrealistic; the shortness of this period may render the Convention meaningless. See *Itel Container Int'l v. Atlantrafik Exp. Serv.*, 686 F. Supp. 438, 444 (S.D.N.Y. 1988) (whether service is untimely under Rule 4(j)) ("The case at bar illustrates that service pursuant to the Hague Convention may be a time-consuming process even in an English-speaking jurisdiction; more than 180 days elapsed between the time of plaintiff's counsel's request for service in London and counsel's receipt of the return certificate").

possible under the Convention because the Convention's procedures either do not provide enough time to meet the statute of limitations or fail to offer a workable method of delivery reasonably calculated to give notice. Subdivision (1)(i), however, ensures that the inability to satisfy the statute of limitations is a result of Convention procedure alone, and not the party's choice to serve later on during the limitations period. The proposal measures the Convention's ability to meet statute of limitations periods thirty days after commencement of the limitations period so as to allow a reasonable period of time for the parties to prepare papers and conduct research on service abroad.

Third, in the event that a party successfully rebuts the presumption of first resort, the proposal permits service by mail so long as the foreign country either does not object or permits a court to tailor a method of service. This offers flexibility to the court where special exigencies exist, and, at the same time, minimizes intrusion upon a foreign nation's sovereignty. In this respect, it is important to note that under this proposal service by mail would not be permitted where a foreign nation either objects under the Convention or prohibits such service under its national laws.

Fourth, subdivision 3, which is presently FRCP 4(i) in pertinent part, is retained in order to deal with service in nations that are not signatories to the Convention.

This proposal would provide a workable and equitable interplay. Such a draft would satisfy the purposes of both the Federal Rules and the Convention.²¹⁰ The proposal provides a definitive method of service that is simple, reliable, and in the spirit of international judicial cooperation by preserving the consistency and uniformity needed for a smoothly functioning international legal regime. The proposal only departs from the language of the Convention when following the Convention would not satisfy the Convention's purposes. The proposal would not treat similarly situated parties in state and federal courts differently.²¹¹ Federal courts would join state courts in affirming a treaty obligation under this approach. Only under a limited set of circumstances, where the plaintiff could prove a strong indication that the Convention would not sufficiently effect service and the Convention or a signatory nation fails to permit mail service under Article 10, would the federal courts actually depart from the Convention. The rule of first resort advances international comity by acknowledging (1) foreign nations' interests in sovereignty and in the protection of their citizens, (2) the United States's interest in effective service methods, and (3) the mutual interests of all nations in a smoothly functioning international legal regime. However, the proposal minimizes a court's need to bal-

210. See *supra* notes 185-91 and accompanying text.

211. In adopting this proposal, the Supreme Court would be rendering an interpretation of a treaty or convention, *i.e.*, that the Convention mandates a rule of first resort in the United States, which is binding upon state courts. See *supra* note 203 and accompanying text.

ance interests by setting forth a presumption of adherence to the Convention and then by enumerating specific standards sufficient to rebut the presumption. At the same time, the alternative mail service provision retains the flexibility needed by American courts and envisioned by the drafters of FRCP 4(i), so long as such mail service does not offend the sovereignty of a foreign nation. In short, the proposal arrives at a reasonable accommodation between the domestic and foreign laws by requiring compliance with the Convention when it assures effective service by American citizens on foreign parties.

Conclusion

Domestic service provisions and the Hague Service Convention occasionally pose mixed signals with respect to the availability of service abroad by mail. On the one hand, while domestic provisions often permit service abroad by mail without limitation, the Hague Service Convention either prohibits service by mail outright, or prohibits such mail service where a signatory nation objects. By sending mixed signals, these two service provisions confuse courts and practitioners attempting to find the appropriate method of service.

Existing attempts to alleviate this confusion and to establish an interplay are inadequate. The current judicial attempts at the lower federal court and Supreme Court levels fail to delineate a workable, uniform, or consistent standard, thereby generating rather than alleviating confusion. Moreover, the 1984 Advisory Committee proposal to amend Rule 4(i) fails to harmonize domestic and international service provisions. An amendment to FRCP 4, however, which, in cases where the Convention has proven ineffective, provides for service by verifiable mail, or through a method developed by order of a court where mail service violates the sovereignty of a foreign nation, satisfies both domestic and international concerns. The approach minimizes American infringement upon the sovereignty of other nations who are signatories to the Convention. The proposal arguably fails to offend foreign nations at all because the amendment only permits departure from the Convention where serving under the Convention would not satisfy the goals or purposes of the Convention. This amendment would advance United States interests in protecting American litigants, preserve judicial independence and advance the object and purposes of the Hague Service Convention by facilitating effective service that could not otherwise be accomplished.

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